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Supreme Court of the United States

OCTOBER 1943 TERM

No. 431

VINCENT RAYMOND DUNNE, JAMES P. CANNON, EDWARD PALMQUIST, MAX GELDMAN, OSCAR COOVER, EMIL HANSEN, ALFRED RUSSELL, GRACE CARLSON, HARRY DEBOER, FARRELL DOBBS, FELIX MORROW, KARL B. KUEHN, JAKE COOPER, CARLOS HUDSON, CARL SKOGLUND, ALBERT GOLDMAN, CLARENCE HAMEL and OSCAR SCHOENFELD,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

SECOND PETITION FOR REHEARING

OSMOND K. FRAENKEL,
ALBERT GOLDMAN,
Attorneys for Petitioners.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Counsel would not importune the Court to consider this case further were it not that continued reflection cannot remove counsel's belief that petitioners' constitutional rights are being disposed of without adequate consideration of the same by this Court and without any such statement of the result as will enable the lower Federal courts properly to apply the law.

We, therefore, respectfully ask the Court's leave to permit the filing of this second petition for rehearing. With regard to the desirability of rejecting the rule of the *Gitlow* and *Whitney* cases we have nothing to add to what we have already said.

We shall confine our discussion, therefore, to the point raised by the government for the first time in its brief in opposition to the original application for certiorari, namely, that the clear and present danger rule is not applicable to this case because the statute punishes advocacy only when uttered with an unlawful intent. This rule, if accepted by this Court, would be far reaching in its consequences. For it would apply not merely to a prosecution under a statute which, as in the case at bar, uses the word intent, but also to every prosecution for an attempt under any statute, no matter what its form. There may be substantive crimes lacking such intent but no attempt can occur without an intent. Thus a man may accidentally kill another, but he cannot accidentally attempt to kill another. So with regard to the particular case here in question, a man might accidentally cause obstruction to recruiting—that is to say, he might make a remark in a setting wholly unrelated to any desired effect upon recruiting, which might nevertheless produce an effect. But he could not accidentally attempt to cause obstruction to recruiting.

This philosophical identity between attempts and intent is important, for it establishes the identity between this case and the *Schenck* case, where the clear and present danger rule was first announced. For the prosecution in the *Schenck* case was essentially one for an attempt. The indictment charged a conspiracy to cause and to attempt to cause obstruction to recruiting, but there was no contention that actual obstruction to recuiting had resulted from the document sent out by the Socialist Party. Moreover, Mr. Justice Holmes expressly said in that case that "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying out of it." Yet Mr. Justice Holmes went on to say that speech could not constitutionally be punished except under circumstances of clear and present danger. The case might as well have been the case at bar.

While the government refers (brief in opposition p. 19) to a statement of Justice Holmes in the *Abrams* case, a careful reading of that opinion indicates no such definite conclusion of Justice Holmes as suggested by the government. For at page 627, shortly before the quotation relied upon by the government, Justice Holmes had thus described the power of Congress constitutionally to punish speech, namely, when "that produces or is intended to produce a clear and imminent danger that it would bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent". It will be noted that it was not the intention to produce the substantive evils that is there stressed, but the intention to create a situation of clear and present danger that such evils might result—quite a different issue than that here submitted to the jury (see R. 1164, 1165).

We submit, therefore, that to adopt the theory now advanced by the government would overrule the *Schenck* case and leave to the clear and present danger rule an application so limited as to be of no practical consequence whatever. We can hardly believe this Court intended such a result. On the other hand, if this Court intended to accept the reasoning of the Circuit Court of Appeals and applied the doctrine of the *Gitlow* and *Whitney* cases despite the unanswered contrary reasoning of Justices Holmes and Brandeis, then we think there should be a public statement to that effect for the guidance of the bench and bar.

We are the more moved to press again for a consideration of this case because we believe that the facts of the case show the injustice of the result reached. Here we have a case where defendants were charged both with conspiring to overthrow the government by force and with conspiring to advocate the overthrow of the government with intent that it be overthrown. It is difficult to draw a distinction between these two charges, for surely everything proved under the second might equally have been proved under the first. Yet the jury acquitted defendants of the first charge.

Defendants were charged also with having conspired to cause insubordination in the armed forces. This charge rests entirely (except perhaps as to certain petitioners) on the fact that defendants were members of the Socialist Workers Party, that prior to the enactment of the statute in question certain principles of the Socialist Workers Party might be interpreted as advocating such insubordination. There is no evidence in the record that the Party advocated insubordination in the armed forces subsequent to the enactment of the statute in question, nor except perhaps with regard to certain petitioners, any evidence that any of the petitioners so advocated. There is certainly no evidence of any conspiracy between them. Whatever inference might have been possible had this statute been of long standing, the presumption of innocence surely must overcome the presumption of continuity and the burden rested on the government to show a criminal design formed at a time when such design was criminal.

The matter relied upon by the government in its brief in opposition fails to meet the burden placed upon the government. The chief reliance of the government in its attempt to show that the Party advocated insubordination in the armed forces is a quotation contained in the brief on page 38. A reference to the record (1085) will show, however, that this quotation has been taken entirely out of context. It is evident that the policy there under discussion relate to the general policy of the Party with regard to a possible revolution, and was not in any way designed to interfere with the discipline of the army in the meantime. Thus the document goes on to say:

> "Workers will be more careful of their rights of their brothers entrusted to them. * * * Worker-soldiers must learn to defend proletarian democracy. Their training must be used to prevent the breaking up of working class meetings, of trade union meetings; to defend the working class press, etc. * * *"

It will be noted, moreover, that this is merely a short section in a long book which is concerned almost entirely with the transition from capitalism to socialism and only incidentally with the army. This is the only matter of any kind put out by the Party after the passage of the Alien Registration Act of 1940. We submit that it is entirely insufficient to form the basis of any charge of conspiracy. The other matter referred to by the government was put out before the enactment of the Smith Act and, moreover, consisted of individual, not Party, statements, or is wholly unobjectionable. The maxim "turn imperialist war into Civil War" came from a publication of April, 1939 (R. 719). The aim to teach the workers to turn their guns against their enemy at home comes (R. 731) from a publication of 1937 (R. 1003) and had not been circulated by the Party for some time prior to 1940 (R. 1003).

The alleged putting into action of the Party's program by various petitioners referred to on pages 40 and 41 of the brief gives an entirely improper and misleading picture. Thus the statement about soliciting an ex-serviceman to agitate at a former army post occurred in early 1939 (R. 494). The statement attributed to petitioner Hudson only that the workers should turn their guns on the different governments is not shown to have been made after the enactment of the Alien Registration Act. The reference (p. 41) to Party meetings at which it was pointed out that the Party could create dissension in the ranks also predates the enactment of the statute, because the witness said that he thought that the meetings took place in the early part of 1940 (R. 543). It is significant, moreover, that Bartlett, one of the important witnesses for the government (pp. 193-240, 250-330, 347-473), testified on cross-examination that petitioner Dunne "didn't tell me anything to the effect that I should join the army and create insubordination nor that I should advise others to join the army and create insubordination" (R. 458).

Whatever might have been the propriety of charging one or more individuals with attempting to cause disaffec-

tion in the armed forces because of statements made after the passage of the Alien Registration Act, there is no basis whatever for a finding that there was a conspiracy to this end to which all of the petitioners were parties.

In the interest of substantial justice and the elucidation of important constitutional principles, we, therefore, respectfully urge this Court to reconsider its previous denial of the application for certiorari and its previous denial of a rehearing.

This application is made in good faith and not for the purpose of delay.

Respectfully submitted,

OSMOND K. FRAENKEL,
ALBERT GOLDMAN,
Attorneys for Petitioners.